NO. 95-1157 (2)

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

Douglas McPherson, In Propria Persona,
Petitioner,
v

JAMES H. BRICKLEY, et al.,
Respondents.

Supreme Court, U.S.
FILED
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CLERK

Petition for Writ of Certiorari
to the Michigan Supreme Court

SUPPLEMENTAL APPENDIX

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8 pp

Supplemental Appendix G
Opinion, Michigan Court of Appeals
March 22, 1995

STATE OF MICHIGAN
COURT OF APPEALS

Docket # 174435

Judith E. McPherson, Plaintiff-Appellee,
v
Douglas McPherson, Defendant-Appellant.

Before: Holbrook, Jr., P.J., and Jansen and O'Connell, JJ.

PER CURIAM

Defendant appeals as of right the order granting plaintiff sole physical custody of the parties' two children. The factual history underlying this case is set forth in this Court's February 23, 1993, unpublished per curiam opinion (Docket No. 147999). Defendant here challenges the procedures used by the trial court in reaching its decision to award plaintiff sole custody of the children. We affirm.

Being dispositional in nature, the ultimate decisions in child custody cases are reviewed de novo. Overall v Overall, 203 Mich App 450, 454; 512 NW2d 851 (1994). However, this Court's review is also limited as stated in MCL 722.28; MSA 25.312(8), which provides that "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue."

Defendant first contends that the trial court committed clear legal error by altering an established custodial environment without clear and convincing evidence that such alteration is in the best interests of the children. MCL 722.27(1)(c); MSA 25.311(1)(c). However, the trial court expressly found that in the present case no sole established custodial environment had existed previously with either parent. In such a situation, "alteration" of an environment does not occur, and the proper evidentiary standard is preponderance of the evidence. Thames v Thames, 191 Mich App 299, 304-305; 477 NW2d 496 (1991). The court properly applied this standard.

Defendant does not attack the court's factual finding that no sole established custodial environment existed. However, conducting a de novo review, Overall, supra, we are not, in light of the record, persuaded that the court's determination in this respect was implausible. Bowers v Bowers, 190 Mich App 51, 53; 475 NW 2d 394 (1991).

Defendant next suggests that evidence favoring plaintiff has been "created" during the time she has had custody since entry of the order appealed. However, since we have found no error on the part of the trial court in applying the preponderance standard, this is immaterial. Further, even were a new determination of the best interests of the children appropriate at this time, defendant has failed to indicate what this "created" evidence is.

Defendant also alleges some type of bias on the part of the trial court. By failing to cite authority to support his argument, defendant has waived this issue. Winiemko v Valenti 203 Mich App 411, 415; 513 NW2d 181 (1994). Additionally, the record does not support

these allegations.

This Court need not reach the issue of alleged factual inadequacies below where defendant sought no adjournment and appears to have accelerated the proceedings below as much as he was able. A party may not seek reversal "on the basis of an error that the party caused by either plan or negligence." Detroit v Larned Associates, 199 Mich App 36, 38; 501 NW2d 189 (1993).

Finally, since we find no error requiring reversal, defendant's request that future proceedings be heard by a different judge is moot. To the extent that defendant's allegations of error are not directly addressed above, we find them to be without merit.

Affirmed.

/s/Donald E. Holbrook, Jr.
/s/Kathleen Jansen
/s/Peter D. O'Connell

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Supplemental Appendix H
Opinion, Michigan Court of Appeals
February 23, 1993

STATE OF MICHIGAN
COURT OF APPEALS

Docket # 147999

Judith E. McPherson, Plaintiff-Appellee,
v
Douglas C. McPherson, Defendant-Appellant.

Before: McDonald, PJ., and Gribbs and Sawyer.

PER CURIAM

Defendant appeals from a December 30, 1991, order denying defendant's motion to reinstitute joint custody and awarding costs and attorney fees to plaintiff. We reverse and remand for further proceedings.

Defendant and plaintiff were divorced in 1982. Pursuant to the judgment of divorce plaintiff and defendant shared joint physical and legal custody of their two minor children, Rachel and Patrick. Defendant had the children weekly from 7:30 a.m. to 5:00 p.m. and every other weekend. This arrangement remained satisfactory until April 27, 1991, when plaintiff filed a petition requesting a change of custody. The petition alleged in part that defendant refused to give Patrick medication required to control Patrick's attention deficit hyperactivity disorder. In what appears to be an interim order dated May 6, 1991, the trial court ordered that the matter be referred to the friend of the court for an investigation regarding custody, visitation and support and ordered temporary custody of the children be given to plaintiff with defendant being awarded reasonable visitation.

On or about June 7, 1991, plaintiff began depriving defendant of all visitation with the children. On July 23, 1991, defendant filed a petition to modify custody and visitation and an order for plaintiff to show cause for her failure to provide defendant visitation with the children.* At an August 15, 1991, hearing on defendant's motion to show cause, the trial court, without taking evidence, but after speaking with the children in chambers, orally suspended defendant's visitation based upon defendant's alleged refusal to administer Patrick his medication. Defendant's motion for discontinuation of medication and hearings on both parties' motions for change of custody were delayed because the trial judge was scheduled to act as a visiting judge in another county.

As of September 5, 1991, no hearing on either party's motion for change of custody had been held, notwithstanding defendant's deprivation of visitation since early June. Thus, on September 5, 1991, defendant filed a motion to resume visitation pending a full hearing on the change of custody issue. A hearing on defendant's motion to resume visitation was held on September 23, 1991. Although testimony was taken from both plaintiff and defendant, the trial judge made clear his position that the "hearing" was not a "hearing" per se and was definitely not a hearing with regard to the matter of custody. The trial judge viewed the hearing as a continuation of the visitation issue raised by defendant's failure to administer Patrick's medication and specifically sought testimony on this subject. On October 14, 1991, the court entered a written order again suspending defendant's visitation, and ordering defendant to attend counseling with the children.

Defendant retained substitute counsel and

filed objections to the proposed order that in effect contested the court's suppression of defendant's joint custody without benefit of a full hearing. No hearing was held on the objections. Thereafter, on December 2, 1991, defendant filed a motion and brief in support thereof to reinstitute joint custody. The brief on the motion again challenged the court's modification of custody absent a full hearing. A hearing on defendant's motion to reinstitute joint custody was held on December 5, 1991. The trial judge stated his belief that defendant's motion was "nothing more than an attempt to reargue the motion [for resumption of visitation] that [it had] already heard and ruled on." Thus, because it found no palpable error in its earlier decision, MCR 2.119, the court denied defendant's motion. Moreover, the court, finding the motion to be frivolous and without legal merit, awarded plaintiff costs and attorney fees in the form of sanctions pursuant to MCL 600.2591; MSA 27A 2591. Defendant appeals from the December 30, 1991, written order incorporating these findings.

We reverse the imposition of sanctions in the form of attorney fees and costs. Although perhaps inartfully drawn, we believe defendant's motion to reinstitute joint custody was a valid attempt to bring the issue of custody before the court. Defendant, who was awarded joint custody of the children in the judgment of divorce, had been deprived this custody without the benefit of hearing on the matter since May 06, 1991. To further exacerbate the situation defendant was deprived of all visitation with his children as of early June 1991. Although the trial court addressed several matters regarding defendant's right to visitation, as of the filing of defendant's motion to reinstitute custody on December 5, 1991, no action had been taken on either part

y's petitions regarding custody. Thus, seven months had elapsed since defendant's joint custody had been suspended without the benefit of a hearing on the matter. This lapse was much too long. Circuit court custody disputes and actions are to have precedence for hearing and assignment for trial over other civil actions. MCL 722.26; MSA 25.312(1). Moreover, a hearing on a custody issue must be held within fifty-six days after filing of a notice that a custody hearing is requested. MCR 3.206(F)(1). Mann v Mann, 190 Mich App 526; 476 NW2d 439 (1991).

We therefore vacate that portion of the December 30, 1991, order awarding costs and attorney fees and remand for further proceedings. Assuming a custody hearing has not yet been held, we order an immediate hearing be held on the matter and that both parties be afforded the opportunity to present any evidence pertinent to the question. Applying the factors listed in subsection A through K of MCL 722.23; MSA 25.312(3), the court shall make specific findings of fact and determine what custody arrangement is in the best interests of the children.

Reversed and remanded. We do not retain jurisdiction.

/s/Gary R. McDonald
/s/Roman S. Gribbs
/s/David H. Sawyer

*Defendant's counsel appears to have overlooked the May 6, 1991, order providing that custody be changed to plaintiff, and that defendant be afforded "reasonable" visitation, because defendant's petition for show cause refers to a violation of defendant's visitation rights pursuant to the judgment of divorce rather than the May 6, 1991 order.